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No. 260

In the Supreme Court of the United States

OCTOBER TERM, 1960

THE EMPLOYERS LIABILITY ASSURANCE CORPORATION, LTD., PETITIONER

v.

P. J. DONOVAN, DEPUTY COMMISSIONER FOR THE SEVENTH COMPENSATION DISTRICT OF THE BUREAU OF EMPLOYEES' COMPENSATION, UNITED STATES DEPARTMENT OF LABOR, AND LOUIS BILLODEAUX

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT DONOVAN, DEPUTY COMMISSIONER, IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit (Pet. App. 13–18) is reported at 279 F. 2d 76. The District Court rendered no written opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on May 27, 1960. The petition for a writ of certiorari was filed on July 23, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under the applicable provisions of the Longshoremen's and Harbor Workers' Compensation Act, the Deputy Commissioner must, at the request of the employer's insurance carrier, hold a hearing to determine the coverage of the Act in regard to an injury to an employee who did not seek relief for the injury under the Act, and filed no claim for such relief.

STATUTES INVOLVED

Pertinent sections of the statutes involved are set forth in the Appendix, *infra*, pp. 11–16.

STATEMENT

Respondent Billodoux injured his right arm on May 22, 1957, while engaged as an iron worker in the construction of an oil drilling rig on a drilling platform built over navigable water on the continental shelf, approximately nine miles off the coast line of Louisiana (R. 3). He filed no claim for benefits under the Longshoremen's and Harbor Workers' Compensation Act [1] either at the time of the accident or thereafter. Petitioner, the insurance carrier for Billodoux's employer, reported the injury to the Deputy Commissioner on May 23, 1957, and, notwithstanding Billodoux's failure to file a claim, paid Billodoux benefits of $54 a week for 53 weeks, plus medical expenses of $1,218.10 (R. 3). Petitioner made these payments voluntarily and without invoking its statu-

[1] This Act was extended, by the Outer Continental Shelf Act, to cover injuries resulting from oil exploration operations conducted on the Shelf. 43 U.S.C. 1333 (b), (c). App., *infra*, pp. 15–16.

tory right to controvert liability for payments under the Act. 33 U.S.C. 914 (a), (d). App., *infra*, pp. 11, 12.

On April 18, 1958, Billodoux returned to work but was apparently unable to perform the duties of his position, and left his employment on May 4, 1958 (R. 4, 13). He then made demand upon petitioner for benefits under the Louisiana Workmen's Compensation Act. On May 26, 1958, he brought two actions in the federal district court—the first for maintenance and cure, and for relief under the Jones Act, and in the alternative for relief under the state compensation statute; the second was for a maritime tort (R. 4–5).

On June 3, 1958, the Deputy Commissioner—according to the allegations in petitioner's complaint—recommended, apparently without knowledge of the pending litigation, that compensation payments under the federal Act be withheld, and a conference held to determine what benefits, if any, were still due under that Act. On June 17, 1958, the Deputy Commissioner informed petitioner that the scheduled conference would not take place and that the matter would be held in abeyance pending the outcome of the litigation (R. 4, 5).

On February 3, 1959, petitioner requested the Deputy Commissioner to hold a hearing to determine (1) if the Deputy Commissioner had jurisdiction "of the claim", (2) if any additional compensation was due, and (3) the amount of such compensation. The Deputy Commissioner refused to hold the hearing requested (R. 5).

On May 29, 1959, petitioner filed a complaint setting forth the above facts[2] and requesting that a mandamus or mandatory injunction be issued requiring the Deputy Commissioner to hold the requested hearing or, in the alternative, that a judgment issue declaring[3] the Longshoremen's and Harbor Workers' Compensation Act to be the employee's exclusive remedy (R. 7).

The employer (respondent Billodoux) filed a "motion to dismiss and for summary judgment" attaching his affidavit and a deposition of his testimony. In his affidavit he asserted that he was a seaman and member of the crew of a vessel (a derrick barge on which he lived while working on the platform). He did not know exactly where the accident took place, but, on the advice of counsel and on information and belief, denied that it was within the area covered by the Outer Continental Shelf Act, and stated that if it was within that area he was excluded from the Act's coverage by virtue of his being a seaman and member of the crew of the barge, so that in either event the Longshoremen's and Harbor Workers' Compensation Act, and its exclusivity provisions, could have no application (R. 8–9).

The Deputy Commissioner also moved to dismiss the complaint for failure to state a claim upon which relief could be granted. The District Court granted the motions and dismissed the complaint (R. 71–72). The Court of Appeals affirmed unanimously, holding that,

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[2] Because the District Court granted the defendants' motions to dismiss, the facts in the complaint have been accepted in our recital of the facts.

[3] 43 U.S.C. 1331, *et seq.*, App., *infra*, pp. 14 *ff.*

in the absence of a claim filed by the employee, the Deputy Commissioner's authority to hold a hearing is, under 33 U.S.C. 914(h), plainly discretionary and not mandatory.

ARGUMENT

This case involves the application of the clear language of two sections of the Longshoremen's and Harbor Workers' Compensation Act which deal with the question as to when hearings are to be held by the Deputy Commissioner. One section, 33 U.S.C. 919(c), App., *infra*, p. 13, provides that the Deputy Commissioner must hold a hearing on application by any interested party *whenever a claim has been filed by the employee* for benefits under the Act. That provision is concededly not applicable here since Billodoux has never filed a claim. The other section, 33 U.S.C. 914(h), App., *infra*, p. 12, provides the Deputy Commissioner with authority to hold a hearing where no claim has been filed, whenever he "considers" such action proper. Both courts below correctly—and we believe necessarily—held that this discretion so vested in the Commissioner by 33 U.S.C. 914(h) precludes mandamus relief in this case. There is no conflict of decisions between the lower courts on this question. Moreover, the doctrine of the "twilight zone" between federal and state jurisdiction is not involved. There is no occasion for review by this Court.

1. The language and the framework of the Act compel the result reached by the Court of Appeals. Section 19 of the Act (33 U.S.C. 919(c)) prescribes the administrative procedures to be followed when the

employee has filed a claim,[4] and states that the Deputy Commissioner "shall order" a hearing in that circumstance "upon application of any interested party" and "shall within twenty days * * * reject the claim or make an award in respect of the claim" 33 U.S.C. 919(c), App. *infra*, p. 13. Section 14 (33 U.S.C. 914)—the only section here involved—prescribes the procedure to be followed when no claim has been filed. That section merely authorizes the Deputy Commissioner to make such investigations or examinations or hold such hearings and take such further action "as he considers will properly protect the rights of all parties" 33 U.S.C. 914(h), App., *infra*, p. 12. As the language of the section makes clear, the authority given is discretionary not mandatory.[5] Therefore, the mandamus-as-of-right sought by petitioner cannot lie; and there is no substantial claim of any abuse of discretion.

2. The existence of a "twilight zone" between state and federal jurisdiction in regard to longshoremen and other amphibious workers has had the practical result of often giving the injured employee an election between state and federal remedies. *Davis* v. *Dep't.*

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[4] The filing of a claim—generally where the employer controverts liability under the Act—is required by the express provisions of the statute (Sec. 19(a), 33 U.S.C. 919(a)) and not, as petitioner suggests, by "interpolation" (Pet. 10, fn. 10).

[5] Petitioner apparently would read the clause "as he considers will properly protect the rights of all parties" to modify only the words "such further action" (Pet. 10, fn. 11). This reading cannot be squared with the use of "such" to modify "investigations", "medical examinations", and "hearings". 33 U.S.C. 914(h), App., *infra*, p. 12.

of Labor, 317 U.S. 249; *Hahn* v. *Ross Island Sand & Gravel Co.*, 358 U.S. 272. Petitioner concedes that it would be "unfair" and "improper" to give "the employer the choice of the employee's remedy" (Pet. 9). Yet that result would follow from petitioner's interpretation of the federal statute. As this Court has recognized, the existence of the presumption in favor of the constitutionality of the state law on the one hand, and the presumption in favor of the jurisdiction of the Deputy Commissioner under the federal Act on the other hand, frequently results in sustaining the jurisdiction of either the state statute, or the federal Act, depending upon the remedy elected by the employee. *Davis* v. *Dept. of Labor*, *supra*. If the employer or his insurance carrier can force the Deputy Commissioner to hold a hearing and determine jurisdiction under the federal Act, the result will normally be to sustain that jurisdiction. The remedy will therefore be that of the federal Act, and the election that of the employer.*

The anomaly of the petitioner's position is highlighted by the relief requested in its complaint. The relief sought is a mandamus or mandatory injunction directing the Deputy Commissioner to hold a hearing to determine if he has "jurisdiction of the claim." (R. 5, 6, 7). But Billodoux here never made or filed a claim and obviously does not, in his choice of available remedies, desire to be hampered by the "exclusivity"

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* Of course, if the employee has filed a claim, the employer can require the Deputy Commissioner to hold a hearing; but by filing a claim the employee elects his remedy under the federal Act.

provision built into the federal Act, 33 U.S.C. 905, App. *infra*, p. 11. Of course, the ultimate relief sought by petitioner is a holding that the Longshoremen's Act's limited compensation benefits apply and that those benefits accordingly constitute Billodoux's exclusive remedy.

3. There is no conflict. Petitioner suggests a conflict between the decision in this case below, and a ruling of the same court, finally rendered on the same day. *Atlantic & Gulf Stevedores* v. *Donovan*, 274 F. 2d 794, on petition for rehearing, 279 F. 2d 75 (Pet. App. 18–36).[7] In *Atlantic & Gulf Stevedores*, however, the employee filed a claim under the Longshoremen's Act.[8] Section 19 of the Act, 33 U.S.C. 919, and its mandatory requirement that the Deputy Commissioner hold a hearing at the request of any interested party were therefore applicable. As the court below recognized, the existence *vel non* of a claim determines whether Section 14 or Section 19 controls, and is therefore dispositive.[9] The alleged intra-circuit conflict is, accordingly, wholly illusory.[10]

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[7] It has been decided that the Deputy Commissioner will not seek certiorari in that case. See Pet. 2.

[8] By so doing he elected to seek his remedies under the Act.

[9] The only conflict of opinion in the court below was between the majority of the panel which heard *Atlantic & Gulf Stevedores*, and the judge (Brown J.) who wrote the original opinion, and dissented from the *per curiam* opinion (279 F. 2d 75) which narrowed that case to situations in which the employee has filed a claim.

[10] Petitioner recognizes that the alleged intra-circuit conflict was averted by the final decisions in the two cases (Pet. 2).

4. Both in its complaint and in its petition, petitioner has asserted the possibility of multiple liability (Pet. 6–9). Such difficulties are more apparent than substantial in this case. The possibility of double liability depends upon the applicability of Louisiana law under the "twilight zone" doctrine[11] (Pet. 7). However, this case does not appear to present a real problem under that doctrine. The injury occurred 9 miles off the coast line of Louisiana (R. 3). This Court recently ruled that the jurisdiction of Louisiana under the Submerged Lands Act, 43 U.S.C. 1301, extends only 3 miles from the coast line. *United States* v. *Louisiana, et al*, 363 U.S. 1, 66–79.[12] Therefore, by express statutory provision, only federal law would seem to be applicable,[13] and this case is probably not within the overlapping area between state and federal jurisdiction known as the "twilight zone." *Pennsylvania R. Co.* v. *O'Rourke*, 344 U.S. 334, 341, fn. 8.

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[11] Since the petitioner paid compensation here, it is not liable for any penalty under the federal Act. The employer can easily avoid any such penalty in any case where there is a substantial doubt as to the Act's applicability by controverting the employee's right to recover compensation. 33 U.S.C. 914(e). The fact that the employee has sought relief both under the Jones Act and under general principles of maritime law is neither unusual nor vexatious. Billodoux can only recover in these suits if he shows that he was a seaman and member of the crew of a vessel, and thus not covered by the Longshoremen's Act. 43 U.S.C. 1333(c). App., *infra*, pp. 15–16.

[12] Billodoux's affidavit denying, for lack of information, that the accident occurred within the area covered by the Outer Continental Shelf Act was made on the advice of counsel nearly a year before that decision (R. 8–9).

[13] 43 U.S.C. 1301, 1331(a), 1333(c), App., *infra*, pp. 14–16.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1960.

APPENDIX

The Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. 901, *et seq.*, provides in pertinent part (as it appears in the United States Code):

§ 905. Exclusiveness of liability.

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.

* * * * *

§ 914. Payment of compensation.

(a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer.

* * * * *

(d) If the employer controverts the right to compensation he shall file with the deputy commissioner on or before the fourteenth day after he has knowledge of the alleged injury or death, a notice, in accordance with a form prescribed by the Secretary stating that the right to compensation is controverted, the name of the claimant, the name of the employer, the date of the alleged injury or death, and the grounds upon which the right to compensation is controverted.

(e) If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subdivision (d) of this section, or unless such nonpayment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

* * * * * *

(h) The deputy commissioner (1) may upon his own initiative at any time in a case in which payments are being made without an award, and (2) shall in any case where right to compensation is controverted, or where payments of compensation have been stopped or suspended, upon receipt of notice from any person entitled to compensation, or from the employer, that the right to compensation is controverted, or that payments of compensation have been stopped or suspended, make such investigations, cause such medical examinations to be made, or hold such hearings, and take such further action as he considers will properly protect the rights of all parties.

* * * * *

§ 919. Procedure in respect of claims.

(a) Subject to the provisions of section 913 of this title a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the Secretary at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

(b) Within ten days after such claim is filed the deputy commissioner, in accordance with regulations prescribed by the Secretary, shall notify the employer and any other person (other than the claimant), whom the deputy commissioner considers an interested party, that a claim has been filed. Such notice may be served personally upon the employer or other person, or sent to such employer or person by registered mail.

(c) The deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect of the claim, and upon application of any interested party shall order a hearing thereon. If a hearing on such claim is ordered the deputy commissioner shall give the claimant and other interested parties at least ten days' notice of such hearing, served personally upon the claimant and other interested parties or sent to such claimant and other interested parties by registered mail, and shall within twenty days after such hearing is had, by order, reject the claim or make an award in respect of the claim. If no hearing is ordered within twenty days after notice is given as provided in subdivision (b) of this section, the deputy commissioner shall, by order, reject the claim or make an award in respect of the claim.

* * * * *

The Submerged Lands Act, 43 U.S.C. 1301, *et seq.*, provides in pertinent part (as it appears in the United States Code):

> § 1301. Definitions.
>
> When used in this chapter—
>
> (a) The term "lands beneath navigable waters" means—
>
> (1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;
>
> (2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles, and
>
> (3) all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined;
>
> * * * * *

The Outer Continental Shelf Lands Act, 43 U.S.C. 1331, *et seq.*, provides in pertinent part (as it appears in the United States Code):

> § 1331. Definitions.
>
> When used in this subchapter—
>
> (a) The term "outer Continental Shelf" means all submerged lands lying seaward and outside of the area of lands beneath navigable

waters as defined in section 1301 of this title, and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control;

* * * * *

§ 1333. Laws and regulations governing lands.

(a) Constitution and United States laws; laws of adjacent States; publication of projected States lines; restriction on State taxation and jurisdiction.

(1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing, and transporting resources therefrom, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: * * *.

* * * * *

(b) Jurisdiction of United States district courts.

The United States district courts shall have original jurisdiction of cases and controversies arising out of or in connection with any operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources, or involving rights to the natural resources of the subsoil and seabed of the outer Continental Shelf, and proceedings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the adjacent State nearest the place where the cause of action arose.

(c) Applicability of Longshoremen's and Harbor Workers' Compensation Act; definitions.

With respect to disability or death of an employee resulting from any injury occurring as the result of operations described in subsection (b) of this section, compensation shall be payable under the provisions of the Longshoremen's and Harbor Workers' Compensation Act. For the purposes of the extension of the provisions of the Longshoremen's and Harbor Workers' Compensation Act under this section—

(1) the term "employee" does not include a master or member of a crew of any vessel, or an officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof;

(2) the term "employer" means an employer any of whose employees are employed in such operations; and

(3) the term "United States" when used in a geographical sense includes the outer Continental Shelf and artificial islands and fixed structures thereon.

* * * * *